IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.327 OF 2005

Anjaline Michel Faroz .. Appellant

Versus

Grampanchayat, Chulne .. Respondent

Mr.G.S.Godbole with Mr.A.M.Kulkarni for appellant.

Mr.V.P.Sawant for respnodent

CORAM : P.V.KAKADE, J.

DATE : 14TH JULY, 2005.

P.C.:

1. This is an appeal preferred by the appellant-plaintff against the judgment and order passed by Addl. District Judge, Palghar dated 19th January, 2005 dismissing the appeal and confirming the judgment and order passed by Civil Judge, Junior Division, Vasai dated 11th December, 2002 dismissing the plaintiff’s suit.

2. I have heard the learned counsel for both the

parties. Perused the record.

3. The plaintiff filed the suit for perpetual injunction against the defendant i.e. Municipal Council, Navghar Manikpur. The suit was filed on the ground that the defendants were making encroachment on the southern side of the plaintiff's property. It was alleged that she was owner of the suit property and it was an agricultural land cultivated by her and on the south side of the property one Bund was constructed extending in east-west direction admeasuring 125 feet. The said Bund was 1 and 1/2 feet broad in the width and according to the plaintiff the defendant had no concerned thereof. Hence the suit came to be filed. The defendant contested the suit on the ground that there was a public way going through the suit land and therefore the suit deserved to be dismissed.

. The learned trial judge adjudicated the dispute on merits and came to the conclusion that the plaintiff was held to be the owner of the suit property. However, it was held that the alleged Bund on the southern side of the property was not part and parcel of the suit land and the plaintiff was not entitled to the relief. The

appeal was carried to the District Court, who after hearing both the parties dismissed the appeal. Hence the present appeal.

4. In this regard it must be noted here initially that pending the appeal against the order an Appeal from Order being A.O. No.581 of 2003 was filed, which was decided by Order dated 13.8.2003 by this Court. It was observed in the said order that both the parties did not bring on record the document of map of the T.I.L.R. to show that Bund in dispute was part and parcel of the particular land or was a public road, and therefore, the matter was remanded to the lower appellate court with direction to allow the parties to bring on record the additional evidence pertaining to the Bund including the T.I.L.R. map and the appeal would be decided on the basis of available record within given period. Accordingly additional evidence was brought on record. The judgment of the lower appellate court shows that the said map was taken into account along with the evidence of Surveyor, however, it is observed in para 6 of the judgment of the appellate court that the Surveyor admitted that in order to ascertain any encroachment of the exact area of a particular "Hissa", the measurements

of the surrounding hissa was required to be taken, but was not done by him. Therefore the lower appellate court came to the conclusion that there was no cogent material on record to hold that the said bund was infact part and parcel of the suit property. In my considered view, the lower appellate court judge has fallen in error obviously due to the reason that he did not consider to remit the matter to surveyor to seek proper compliance of the order passed by this Court dated 13.8.2003 in A.O.No.581 of 2003, which specifically directed that the parties for allowing production of additional evidence on record so ascertain whether or not the particular Bund was a part and parcel of particular land or a public road. In other words, it is necessary for the lower appellate court judge to get the survey done after taking measurement not only of the suit property and Bund alone but also of surrounding Hissa in order to determine the issue whether the said Bund was part and parcel of the suit property or a public road as contended by the defendant Council.

. Hence the judgement and order passed by the lower appellate court dated 19th January 2005 is hereby set aside. The appeal is remanded to the lower

appellate court with direction that the Court Commissioner shall be appointed, preferably Surveyor from T.I.L.R. Office, to admeasure not only the suit property but also the surrounding lands in order to establish whether the suit Bund was part and parcel of the plaintiff's property or was a public road. The lower appellate court is directed to comply with the said order and adjudicate the dispute afresh on the basis of available record after giving opportunity to both the sides. The matter shall be adjudicated as early as possible in any case within four months from the date of this order. In the meantime the earlier ad-interim order passed shall continue.

. All concerned to act on a copy of this order duly authenticated.